Watson
ENVIRONMENTAL LAW
Spring 1994

INSTRUCTIONS

1. You have three hours (180 minutes) to complete the exam. Write your exam number in the space provided on this page.

2. All answers are to be written in the bluebooks. Please write legibly and on every other line. Indicate on the front of each bluebook the questions answered therein.

3. The exam is closed book. You may not bring written or printed materials into the exam room. Attached to this exam is a listing of selected statutory provisions from RCRA, CERCLA, the Clean Water Act, and the Clean Air Act.

4. You must turn in your examination along with your bluebooks.

5. The fact situation gives rise to Questions 1-3. Questions 4-14 require short answers or brief discussion.

6. THE BREAKDOWN OF THE QUESTIONS (AND CORRESPONDING TIME) IS AS FOLLOWS:

Question 1: 45 % of the exam (81 minutes)

Question 2: 17 1/2 % of the exam (31 1/2 minutes)

Question 3: 10 % of the exam (18 minutes)

Questions 4-14: 27 1/2 % of the exam (49 1/2 minutes)

TOTAL 100 % of the exam (180 minutes)

7. The weight of the 11 short questions is noted below:

Question 4 counts for 3 % of the exam
Question 5 counts for 3 % of the exam
Question 6 counts for 2 1/2 % of the exam
Question 7 counts for 2 1/2 % of the exam
Question 8 counts for 2 1/2 % of the exam
Question 9 counts for 2 1/2 % of the exam
Question 10 counts for 2 1/2 % of the exam
Question 11 counts for 2 1/2 % of the exam
Question 12 counts for 2 1/2 % of the exam
Question 13 counts for 2 % of the exam
Question 14 counts for 2 % of the exam

8. Good luck.

As shown above, the Lazy River forms the south boundary of a tract of land previously owned by the BEXEL COMPANY and presently owned by CHEM-GLO, a company which manufactures

widgets. The land to the east is owned by WILL NELSON, who bought it from SHERRI WATSON.

In 1985, the BEXEL COMPANY built the factory presently owned by CHEM-GLO and began to build widgets. The widget manufacturing process produces both wastewaters (containing ammonia, lead, and chlorine) and hazardous wastes (zinc and chromium). In recognition of the water pollution problem, BEXEL obtained a five-year NPDES permit from EPA that allowed BEXEL to discharge the specified pollutants from the factory into the Lazy River as follows:

Pollutant:	Effluent Limit (Daily Average):
Ammonia	15.00 mg/l (milligrams per liter)
Lead	0.05 mg/l
Chlorine	8.00 mg/l

In order to deal with its hazardous waste problem, BEXEL contracted with its neighbor, SHERRI WATSON, to come over, pick up barrels of zinc and chromium, and then place the barrels in the heavily wooded area of WATSON's land west of the Lazy River. The contract, which was non-assignable, stated that the placement of barrels was to be temporary until BEXEL found a permanent disposal site.

In 1987, SHERRI WATSON sold her farm to WILL NELSON. Prior to closing the deal, NELSON physically inspected the eastern part of the property; he did not, however, inspect the woods west of the Lazy River. As a farmer, NELSON expressed no interest in the wooded area, and WATSON said nothing about the barrels of hazardous waste located in the woods. The purchase agreement provided that:

> "the Buyer is purchasing the described property 'as is' and, upon transfer of title, assumes all responsibility caused by the conditions on the property."

One day after WATSON sold her land to NELSON, BEXEL sold its land and factory to CHEM-GLO. As part of the transaction, the NPDES permit was transferred to CHEM-GLO (without EPA objection). CHEMGLO immediately began operations, and its plant foreman, GEORGE FOREMAN, quickly realized that he had a hazardous waste disposal problem. He informed the plant supervisor, MARK SUPER, who told FOREMAN that "getting rid of that stuff is your problem."

FOREMAN solved his problem by paying his neighbor, JOHN NABOR, to haul away the hazardous wastes. FOREMAN instructed NABOR to go the factory on Sundays when no one was there, load the barrels of zinc and chromium in his truck, and "take them away." FOREMAN did not know (and did not want to know) where NABOR was taking the barrels. Figuring the sooner he got rid of the stuff the better, NABOR unloaded the barrels in the same place that BEXEL had used: the wooded area of the farm just to the east of the widget factory.

For the next seven years, from 1987 to 1994, NELSON farmed the east portion of his land. During this same period, CHEM-GLO -- which in 1990 received another five-year NPDES permit with the same effluent limitations -- continued to make widgets.

In March 1994, however, NELSON began to explore the possibility of selling the farm. Each year his crop yields had decreased, despite perfect weather conditions and the fact that he had amply irrigated his fields with water from the Lazy River. Even more alarming was the fact that his son was suffering from constant headaches and nausea. Finally,

NELSON was fed up with the exceedingly foul odors that permeated the air whenever the wind was blowing eastward.

Prior to putting his land on the market, NELSON had his property inspected and appraised. To his horror, he learned the following:

> The wooded portion of his land is full of leaking barrels of hazardous wastes. Attached to some barrels are labels which say "BEXEL - THE COMPANY THAT CARES". The rest of the barrels are stamped with the "CHEM-GLO" name.
>
> The foul odors are attributable to the widget factory.
>
> The Lazy River contains elevated levels of lead, ammonia, and chlorine. The water contamination may be causing, or contributing to, the decline in NELSON's crop yields.
>
> The well water - used by the family for washing, bathing, and drinking - contains elevated levels of zinc and lead.
>
> The fair market value of the farm, in light of the problems described above, is less than half the price paid by NELSON in 1987.

In April 1994 NELSON retains a lawyer. NELSON is a very angry individual. He blames the widget factory and SHERRI WATSON for his problems. Moreover, he is upset that he had to spend $15,000 to fence off the wooded area and to remove the few barrels that had not leaked to an EPA-sanctioned disposal site.

NELSON instructs his lawyer to "get those who are responsible in every way possible." His lawyer examines the Discharge Monitoring Reports (DMRs) filed by BEXEL and CHEM-GLO as required by their NPDES permits. The DMRs reveal numerous violations, which are summarized below:

POLLUTANT:	PERMIT VIOLATIONS:
Ammonia	2 to 5 violations every month since 1985
Lead	1 to 4 violations per year since 1985
Chlorine	sporadic violations throughout 1985-1992; no reported violations since 1992

NELSON's lawyer learns that there are two possible explanations for why the chlorine violations stopped in 1992. One possibility is that the cessation of chlorine permit violations is attributable to an alteration in the manufacturing process which occurred in 1992. The other possibility is that the cessation of the chlorine permit violations is attributable not to the alteration in the manufacturing process, but instead to a decision by the Chem-Glo management to decrease the amount of chlorine used until the price of chlorine drops back from record levels which first appeared in 1992.

QUESTION #l (45 % of the exam) (81 minutes)

You are NELSON's lawyer. For each claim that NELSON could assert, please do the following:

(a) identify the claim that NELSON could assert;

(b) list those individuals/entities against whom the claim

in question could be asserted;

(c) identify the relief that could be awarded if the claim succeeds;

(d) briefly discuss what NELSON must do/show in order to succeed on the claim; and

(e) briefly discuss what defenses might be raised in response to the claim. Briefly evaluate such defenses.

QUESTION #2 (17 1/2 % of the exam) (31 1/2 minutes)

For purposes of this question, assume that NELSON does not file a lawsuit. Instead, it is the EPA that decides it will sue. Please discuss the following four questions:

If EPA was the plaintiff instead of NELSON, what difference, if any, would it make in terms of:

(a) the individuals/entities against whom claims could be asserted?

(b) the claims that could be asserted?

(c) the relief that could be sought?

(d) what must be done/shown in order to succeed on the claims brought?

NOTE: PLEASE MARK THE ANSWERS IN YOUR BLUEBOOK AS 2(a), 2(b), 2(c), and 2(d).

QUESTION #3 (10 % of the exam) (18 minutes)

Is NELSON an "innocent landowner" for purposes of CERCLA? Why or why not?

THE REMAINDER OF THE EXAMINATION CONSISTS OF SHORT QUESTIONS, REQUIRING SHORT ANSWERS OR DISCUSSION

QUESTION # 4 (3 % of the exam) (5.4 minutes)

How does RCRA regulate wastes from "cradle to grave"?

QUESTION # 5 (3 % of the exam) (5.4 minutes)

EPA is presented with discharge monitoring reports that show violations of a NPDES permit. The discharger is located in a state that has been given NPDES permitting authority. Briefly outline EPA's enforcement options, if any.

QUESTION # 6 (2 1/2 % of the exam) (4.5 minutes)

In terms of its focus and application, why is NEPA different from the other federal environmental statutes (RCRA, CERCLA, CWA, CAA) covered in this course?

QUESTION # 7 (2 1/2 % of the exam) (4.5 minutes)

The Clean Air Act requires EPA to issue "criteria" documents. Why? The CAA also requires EPA to review previously issued "criteria" documents and revise them when appropriate. Why?

QUESTION # 8 (2 1/2 % of the exam) (4.5 minutes)

What role(s), if any, did Congress give EPA in the administration of §404 of the Clean Water Act?

QUESTION # 9 (2 1/2 % of the exam) (4.5 minutes)

Discuss how a point source discharger can obtain a variance from BAT. Can the costs of complying with BAT be considered?

QUESTION # 10 (2 1/2 % of the exam) (4.5 minutes)

What is the argument for allowing "backsliding"? What is the argument for prohibiting "backsliding"?

QUESTION # 11 (2 1/2 % of the exam) (4.5 minutes)

What is a FONSI? Would an agency issue a FONSI in conjunction with (1) an EA; (2) an EIS; (3) either an EA or an EIS; or (4) neither an EA nor an EIS? Why?

QUESTION # 12 (2 1/2 % of the exam) (4.5 minutes)

Does the Part D nonattainment program impose requirements on existing sources in nonattainment areas? [If the answer is no, just say so. If the answer is yes, identify one requirement imposed on existing sources in nonattainment areas.]

QUESTION # 13 (2 % of the exam) (3.6 minutes)

Give one example of how NAAQs and water quality standards are similar. Give one example of how NAAQs and water quality standards are different.

QUESTION # 14 (2 % of the exam) (3.6 minutes)

Discuss whether a state, in setting a water quality standard, may consider economic factors.

END OF EXAM QUESTIONS

SELECTED PROVISIONS FROM RCRA

SUBCHAPTER III (or "SUBCHAPTER C"): HAZARDOUS WASTE MANAGEMENT

§ 3004 STANDARDS FOR OWNERS/OPERATORS OF TSD FACILITIES

§ 3005 PERMITS FOR TREATMENT, STORAGE, DISPOSAL OF HAZ. WASTE

§ 3008 FEDERAL ENFORCEMENT

SUBCHAPTER VII: MISCELLANEOUS PROVISIONS

§ 7002 CITIZEN SUITS

§ 7003 IMMINENT HAZARD

SELECTED PROVISIONS FROM CERCLA

SUBCHAPTER I: HAZ. SUBSTANCES. RELEASES. LIABILITY, COMPENSATION

§ 101 DEFINITIONS

§ 103 NOTIFICATION REQUIREMENTS FOR RELEASED SUBSTANCES

§ 104 RESPONSE AUTHORITIES

§ 105 NATIONAL CONTINGENCY PLAN (NCP)

§ 106 (EPA-ORDERED) ABATEMENT ACTIONS

§ 107 LIABILITY (FOR CLEAN-UP COSTS)

§ 108 FINANCIAL RESPONSIBILITY

§ 109 CIVIL PENALTIES AND AWARDS

§ 111 USE OF THE SUPERFUND

§ 112 SUPERFUND CLAIMS PROCEDURE

§ 113 CIVIL PROCEEDINGS (JUDICIAL REVIEW, CONTRIBUTION)

§ 114 RELATIONSHIP TO OTHER LAWS

§ 116 SCHEDULES (TIMETABLES FOR ACTIONS)

§ 117 PUBLIC PARTICIPATION

§ 120 FEDERAL FACILITIES (LIABILITY OF UNITED STATES)

§ 121 CLEANUP STANDARDS

§ 122 SETTLEMENTS

§ 123 REIMBURSEMENT TO LOCAL GOVERNMENTS

§ 126 INDIAN TRIBES

SUBCHAPTER III: MISCELLANEOUS PROVISIONS

§ 309 ACTIONS UNDER STATE LAW... (STATUTES OF LIMITATION)

§ 310 CITIZEN SUITS

SELECTED PROVISIONS FROM THE CLEAN WATER ACT

SUBCHAPTER I: RESEARCH AND RELATED PROGRAMS

§ 101 CONGRESSIONAL DECLARATION OF GOALS AND POLICY

SUBCHAPTER III: STANDARDS AND ENFORCEMENTS

§ 301 EFFLUENT LIMITATIONS

§ 302 WATER QUALITY RELATED EFFLUENT LIMITATIONS

§ 303 WATER QUALITY STANDARDS & IMPLEMENTATION PLANS

§ 304 INFORMATION AND GUIDELINES

§ 306 NATIONAL STANDARDS OF PERFORMANCE

§ 307 TOXIC AND PRETREATMENT EFFLUENT STANDARDS

§ 309 ENFORCEMENT

§ 311 OIL AND HAZARDOUS SUBSTANCE LIABILITY

§ 313 FEDERAL FACILITIES POLLUTION CONTROL

§ 319 NONPOINT SOURCE MANAGEMENT PROGRAMS

SUBCHAPTER IV: PERMITS AND LICENSES

§ 401 CERTIFICATION

§ 402 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

§ 404 PERMITS FOR DREDGED OR FILL MATERIAL

SUBCHAPTER V: GENERAL PROVISIONS

§ 502 DEFINITIONS

§ 505 CITIZEN SUITS

§ 509 ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

§ 510 STATE AUTHORITY

SELECTED PROVISIONS FROM THE CLEAN AIR ACT

SUBCHAPTER I: PROGRAMS AND ACTIVITIES

PART A: AIR QUALITY AND EMISSION LIMITATIONS

§ 101 CONGRESSIONAL FINDINGS & DECLARATION OF PURPOSE

§ 107 AIR QUALITY CONTROL REGIONS

§ 108 AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

§ 109 NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)

§ 110 STATE IMPLEMENTATION PLANS (SIPS)

§ 111 STDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

§ 112 HAZARDOUS AIR POLLUTANTS

§ 113 FEDERAL ENFORCEMENT PROCEDURES

§ 114 RECORDKEEPING, INSPECTIONS, MONITORING, ENTRY

§ 120 NONCOMPLIANCE PENALTY

PART C: PREVENTION OF SIGNIFICANT DETERIORATION (PSD) (skip)

PART D: PLAN REOUIREMENTS FOR NONATTAINMENT AREAS

§ 171 DEFINITIONS

§ 172 NONATTAINMENT PROVISIONS

§ 173 PERMIT REQUIREMENTS

§§174-93 [MOSTLY CONSISTS OF POLLUTANT-SPECIFIC REQUIREMENTS]

SUBCHAPTER III: GENERAL PROVISIONS

§ 302 DEFINITIONS

§ 304 CITIZEN SUITS

§ 307 ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW